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No. 00-497

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: November 1, 2000

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondents have declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in

Ohio. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform. WLF appeared as *amicus curiae* in three recent cases in which the Court addressed the gatekeeping function of federal judges with respect to the admission of expert testimony. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

WLF recognizes that federal district judges must be afforded broad discretion with respect to the precise method by which they perform their expert-witness "gatekeeping" function. Such decisions should not be reversed on appeal in the absence of an abuse of that discretion. Nonetheless, the discretion afforded district judges does not include the discretion to perform their gatekeeping function inadequately or not at all. WLF believes that it is incumbent on the appellate courts to ensure that district courts are doing an adequate job of excluding unreliable and irrelevant expert testimony from trial. WLF is concerned that the decision below, if allowed to stand, will deprive appellate courts of the tools necessary to perform their oversight function.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Accordingly, WLF believes that it can bring a perspective on the issues presented that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Amicus curiae will address the following question only:

Whether a trial court presented with a motion to exclude expert testimony as unreliable under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is required to provide a reasoned explanation on the record concerning its decision to admit or exclude the testimony.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

This case arises from a 1988 traffic accident in which a Bronco II manufactured by Petitioner Ford Motor Co. ("Ford") rolled over several times. Two unbelted occupants were ejected from the vehicle and died from their injuries. The estates of the two decedents filed this tort action against Ford, claiming that the Bronco II was defectively designed and that the alleged defect was the proximate cause of the deaths. Petition Appendix ("Pet. App.") 2a-3a.

Respondents' principal expert witness on design defect issues was Melvin Richardson. Richardson testified that the Bronco II was defectively designed in three respects: (1) its "stability index" (which purportedly measures a vehicle's ability to resist rolling over) was too low; (2) a rear stabilizing bar on the Bronco II causes the vehicle to oversteer, which is characterized by spinning out on a turn; and (3) the front suspension on the Bronco II causes "jacking" (that is, the front of the vehicle will rise during a hard turn). Pet. App. 7a. Richardson further testified that the three alleged defects he identified were the sole causes of the roll over that occurred in this case. *Id.* at 8a.

One week before trial, Ford filed a motion in limine to exclude or limit Richardson's testimony on the ground that it was unreliable. *Id.* at 4a. The trial judge denied a hearing on the motion, holding that the motion was untimely. *Id.* When, at trial in May 1998, Respondents sought to qualify Richardson as an expert witness on design

defect issues, the trial judge permitted Ford to interpose a "continuing objection" to the admission of any of Richardson's expert testimony, and then permitted the expert testimony to proceed. *Id.* at 32a-33a. At the conclusion of Respondent's case, the trial judge without explanation denied Ford's motion to strike all of Mr. Richardson's testimony "under the grounds of *Daubert*." *Id.* at 34a. At the close of all the evidence, the trial judge again denied without explanation Ford's motion to exclude the expert testimony. *Id.*

After trial, the jury returned a verdict against Ford and awarded Respondents $17.5 million in compensatory damages (later reduced to $10.5 million). Ford then moved for judgment notwithstanding the verdict or, alternatively, for a new trial on several grounds, including that Richardson's expert testimony was inadmissible. The trial court denied the motion, stating that there was sufficient evidence aside from Richardson's testimony upon which the jury might have concluded that a defect in the Bronco II proximately caused Respondents' damages. *Id.* at 35a-48a. The trial judge's order denying the motion did not address the reliability of Richardson's testimony.[2]

Ford's appeal from the district court judgement relied principally on its claim that Richardson's expert testimony should not have been admitted into evidence. A divided

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[2] The order nonetheless implicitly affirmed the trial judge's prior rulings that the expert testimony was properly admitted into evidence. Ford indisputably would have been entitled to a new trial if it were determined that Respondents' principal evidence regarding design defect had improperly been admitted into evidence.

panel of the U.S. Court of Appeals for the Sixth Circuit affirmed. *Id.* at 1a-25a.

The majority admitted that this was a "close case," but it affirmed on the ground that it was "not firmly convinced that the [district] court abused its discretion by allowing Richardson to testify." *Id.* at 4a. The appeals court acknowledged the factual accuracy of Ford's criticism of Richardson's methodology. *Id.* at 8a.[3] The appeals court also acknowledged that the trial judge never explicitly indicated that he had examined the reliability of Richardson's methodology and conclusions, and never stated that he was admitting Richardson's testimony because he had concluded that the testimony was reliable. *Id.* at 5a. The appeals court nonetheless ruled that the trial judge must have arrived at that conclusion because he would not otherwise have denied the motion to exclude the testimony. *Id.*[4]

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[3] In particular, the appeals court stated (as noted by Ford) that Richardson's "investigation consisted only of reviewing the police accident report and 'some' depositions, statements, and photographs and of visiting the accident site the day before he testified." *Id.* The court also noted his "failure to test his theories that the Bronco II oversteers and 'jacks.'" *Id.*

[4] The appeals court's precise rationale was as follows:

> Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion in limine squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinions with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We conclude, based on the district court's rulings on the motions and

(continued...)

The appeals court then examined the evidence bearing on the trial court's "finding" that Richardson's testimony was reliable, "focus[ing] on the methodology and principles used by Richardson, not on his conclusions." *Id.* at 6a. Based on that examination, the appeals court ruled that the district judge had not abused his discretion in determining that Richardson's expert testimony was sufficiently reliable to be admitted under F.R.E. 702. *Id.* at 6a-9a. With respect to Mr. Richardson's admitted failure to test his theories that the Bronco II oversteers and "jacks," the appeals court opined: "The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility." *Id.* at 8a.

Judge Ryan dissented. *Id.* at 18a-25a. He stated that the district court's decision to admit Richardson's expert

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[4](...continued)
objections, that the court determined Richardson's testimony was relevant and reliable.

Id.

The trial court issued its rulings in 1998, a year before this Court issued its decision in *Kumho Tire*. That decision resolved a split among the circuit courts by determining that the "gatekeeping" function imposed on trial courts by F.R.E. 702 (and described in detail in *Daubert*) applied not only to scientific expert testimony but to other types of expert testimony as well. *Kumho Tire*, 526 U.S. at 141. Nonetheless, the appeals court's decision does not consider the possibility that the trial judge admitted Mr. Robertson's testimony not because he believed that the testimony could survive a *Daubert* "gatekeeping" analysis but because he believed (as did many federal courts prior to *Kumho Tire*) that the "gatekeeping" analysis is not required when (as here) the expert testimony does not qualify as "scientific" expert testimony.

testimony was reversible error, because the district court "made no express assessment at any time as to the reliability of Dr. Richardson's testimony." *Id.* at 20a. Judge Ryan also determined that it would have been an abuse of discretion for the district court to have found that Richardson's testimony was reliable. He concluded:

> The record is absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reaching his accident reconstruction opinion was "good science" or "good engineering." . . . The record is also devoid of any evidence showing that Dr. Richardson employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects.

Id. at 21a-22a.

The Sixth Circuit denied rehearing on August 15, 2000. *Id.* at 86a-87a. Ford filed its petition for a writ of certiorari on October 2, 2000.

REASONS FOR GRANTING THE PETITION

WLF fully supports the arguments put forth by Ford regarding why grant of the Petition is warranted. The Sixth Circuit concluded that the "gatekeeping" functions imposed by F.R.E. 702 do not require a district court to present a reasoned explanation concerning its decision to admit or exclude expert testimony; that conclusion squarely conflicts with a decision from the Tenth Circuit. Moreover, the decision below is inconsistent with this Court's decision in *Kumho Tire*. The Sixth Circuit held that a district court does not abuse its discretion by admitting the testimony of

a proposed expert who fails to test his theories despite the feasibility of doing so; *Kumho Tire* indicates that an expert's failure to test his theories renders his testimony unreliable, and therefore inadmissible under F.R.E. 702, where (as here) the presence or absence of testing is a "reasonable measure[] of the reliability of [the] expert testimony." *Kumho Tire*, 526 U.S. at 152; *see id.* at 158-59 (Scalia, J., concurring) (district courts not afforded "discretion to abandon the gatekeeping function").

WLF writes separately in order to emphasize the significant public importance of the issues raised by this case. Use of expert testimony is becoming increasingly frequent in federal court trials. In many complex cases, the decision whether to admit proffered expert testimony is outcome-determinative, in the sense that the party bearing the burden of persuasion will not be permitted to put his case before a jury if the testimony is excluded. Expert testimony frequently weighs heavily on a jury's deliberation, in light of the layperson's natural tendency to accept uncritically the conclusions of well-credentialed witnesses. Accordingly, as the Court made resoundingly clear in *Daubert* and *Kumho Tire*, district judges must take seriously their role as gatekeepers and exclude from trial any expert testimony not shown to be both relevant and reliable.

Just as trial judges are charged with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, *appellate* judges are charged with the responsibility of ensuring that trial judges are not abusing their discretion in performing their gatekeeping function. This case raises issues of tremendous practical importance regarding that appellate function. If, as the Sixth Circuit held, trial judges are under no obligation to provide reasoned explanations for

their decisions to admit or exclude expert testimony, then appellate review will be quite limited. Because it often will be impossible to ascertain the actual basis for the trial court's ruling, decisions to admit or deny expert testimony will be upheld so long as the trial court *could have* articulated *some* basis that would not have constituted an abuse of discretion. If, on the other hand, the Tenth Circuit's decision in *Goebel v. Denver and Rio Grande Western Ry. Co.*, 215 F.3d 1083 (10th Cir. 2000), is correct and trial courts *are* required to make specific findings regarding the bases for such decisions, then more meaningful appellate review will be possible.

WLF respectfully suggests that the Tenth Circuit has the better argument. In light of the developing case law in this area as well as changes in the underlying rules of evidence,[5] it is inevitable that trial courts will make errors of law when performing their Rule 702 gatekeeping function. Such errors of law constitute "abuse of discretion" and thus are subject to reversal on appeal. Yet, if trial courts are not required to state the bases for their rulings, appellate courts will not discover those errors of law and will have no opportunity to correct them.

Moreover, as the Court has recognized, the Rule 702 gatekeeping function imposes a substantial burden on district judges. *Daubert*, 509 U.S. at 592-95; *Joiner*, 522 U.S. at 147-48 (Breyer, J., concurring) ("This requirement will sometimes ask judges to make subtle and sophisticated

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[5] An amendment to Rule 702 of the Federal Rules of Evidence was adopted by the Court on April 17, 2000 and is scheduled to take effect on December 1, 2000. Nothing in the amendment bears directly on the issues raised by the Petition.

determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer. . . Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the "gatekeeper" duties that the Federal Rules impose."). Given that burden, some district courts may be tempted to abdicate their gatekeeping function altogether -- by admitting expert evidence of questionable reliability on the theory that the jury is equipped to evaluate reliability on its own. There is evidence that numerous trial courts gave in to that temptation prior to *Daubert*, and that the practice may continue even today. Establishing a "reasoned explanation" requirement would significantly reduce the likelihood that a trial judge will admit expert testimony solely to avoid the gatekeeping burdens imposed by Rule 702.

In light of the significant impact that the issues raised by this case will have on the admissibility of expert testimony, WLF respectfully submits that the Petition should be granted.

I. REVIEW IS WARRANTED BECAUSE THE QUESTION PRESENTED IS OF MAJOR IMPORTANCE IN THE LARGE NUMBER OF EXPERT TESTIMONY MOTIONS ADDRESSING UNRESOLVED ISSUES OF LAW

Rule 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to provide expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The Supreme Court has made clear that Rule 702 imposes on trial judges a substantial "gatekeeping" function; they are

to exclude proffered expert testimony unless it meets Rule 702's exacting standards. *Daubert*, 509 U.S. at 589 ("under the Rules the trial judge *must insure* that any and all scientific testimony or evidence admitted is not only relevant, *but reliable*") (emphasis added). *Kumho Tire* held that the same exacting standards apply to *all* expert testimony, regardless whether the testimony is deemed "scientific" in nature (as in *Daubert*) or whether the testimony relates to "technical or other specialized knowledge." *Kumho Tire*, 526 U.S. at 151.

"Abuse of discretion" is the proper standard of review in an appeal from a trial judge's decision to admit or deny expert testimony pursuant to Rule 702. *Joiner*, 522 U.S. at 143. Under that standard, findings by a district judge regarding whether the proffered expert testimony meets the exacting legal standards established by Rule 702 are generally entitled to substantial deference. *Id.* That same deference does not apply to a trial judge's interpretation of Rule 702's legal requirements. Rather, even under an "abuse of discretion" standard, issues of law are subject to de novo review. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Every federal appeals court that has addressed the issue in the context of alleged errors of law under Rule 702 has held that a district court abuses its discretion when it admits or excludes expert testimony based on an error of law. *See, e.g., Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999); *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 151 (3d Cir. 1999); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1577 (1999).

When a trial judge fails to explain her reasons for admitting or excluding expert testimony, appellate courts cannot determine whether the trial judge has issued her ruling based on a misunderstanding of Rule 702's legal requirements. Under those circumstances, rulings admitting or excluding expert testimony based on errors of law will never be corrected.

The possibility of such unreviewable errors would be of lesser importance if Rule 702's legal requirements were relatively clear and thus federal judges could be expected to apply the correct legal standards in the great majority of cases. However, the situation now facing the federal courts is quite the opposite: there are numerous unresolved issues of law surrounding Rule 702 that have led to conflicting lower-court decisions, and thus virtually any trial court decision to admit or deny expert testimony runs a very real risk of being based on legal error.

This brief describes several of the unresolved issues of law surrounding Rule 702. The existence of these unresolved legal issues serves to highlight the importance of this case; only by granting review and adopting the Tenth Circuit's rationale in *Goebel* (and thereby rejecting the decision below that trial courts need not provide a reasoned explanation of their Rule 702 rulings) can the Court ensure effective review of decisions addressing those unresolved issues.

Differential Diagnosis. One issue that has created considerable conflict, both within the federal courts and among academics, is the admissibility of expert medical testimony offering opinions based on a diagnostic technique known as "differential diagnosis." Differential diagnosis is

commonly used by doctors in an effort to determine what injury/disease is giving rise to a patient's symptoms, and/or to determine what was the cause of the patient's injury/disease. After compiling a list of all possible causes of the injury/disease, doctors conduct tests in an effort to eliminate sufficient numbers of the possible causes to allow them to identify the actual cause with some degree of accuracy. *See, generally, Westberry,* 178 F.3d at 263-64.

There has been considerable disagreement among the federal appellate courts regarding the conditions under which medical opinions based on differential diagnostic should be deemed reliable and thus admissible under Rule 702. In particular, there has been considerable disagreement regarding the significance of temporal proximity (e.g., if a disease first arose immediately after the plaintiff's exposure to a chemical, can any conclusions be drawn regarding whether the exposure caused the disease?).

A considerable body of thought holds that temporal proximity should play little or no role in differential diagnoses. *See, e.g., Moore v. Ashland Chemical, Inc.,* 151 F.3d 269, 278 (5th Cir. 1998) (*en banc*) (temporal proximity, standing alone, is entitled to little weight in determining causation), *cert. denied,* 119 S. Ct. 1454 (1999); *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996) (temporal relationship is a "perilous basis" for causal inference), *cert. denied,* 519 U.S. 819 (1996); Mark R. Hall, *Applying Daubert to Medical Causation Testimony by Clinical Physicians,* 27 PRODUCT SAFETY & LIABILITY No. 45 (Nov. 12, 1999); Daniel J. Capra, *The Daubert Puzzle,* 32 Ga. L. Rev. 699, 723-24 (1998) (an expert's primary reliance on temporal proximity to demonstrate

causation is a "red flag" suggesting that the proffered testimony is unreliable).[6]

Other authorities have been far more receptive to differential diagnoses based on temporal proximity and have been highly critical of decisions, such as *Moore,* that dismissed that approach as unreliable. *See, e.g.,* Note, *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science,* 113 Harv. L. Rev. 1467, 1482-83 (2000); *Westberry,* 178 F.3d at 265 (disagreeing with *Moore,* Fourth Circuit states, "depending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation").

Given the roughly even split among federal courts on the propriety of experts' reliance on temporal proximity to demonstrate causation, it stands to reason that a sizeable number of federal court decision addressing the issue are based on errors of law. Yet, many of those errors will go unreviewed on appeal for so long as trial courts making those decisions are not required to provide a reasoned explanation.

Expert Testimony Based Solely on Experience. One need not possess specialized scientific or technical training in order to qualify as an expert witness under Rule 702. So long as one has, through experience, gained knowledge not widely shared, one may be permitted to testify as an expert witness regarding that knowledge. Thus, for example, a

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[6] Prof. Capra serves on the Judicial Conference Advisory Committee on the Federal Rules of Evidence. The Committee's proposed revisions to Rule 702 were recently adopted by the Court.

police officer familiar with illegal drug transactions may be permitted to testify as to the meaning of code words used to conceal the nature of those transactions. *See* Committee Notes to April 2000 amendments to Federal Rules of Evidence at 25. But according to those Notes, an expert seeking to testify based solely on experience cannot establish the reliability of his testimony based solely on his own say-so: "The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.* at 26.[7]

The obvious follow-up question is, "How much more?" This Court has never articulated a standard, and the answers provided by the lower courts are far from uniform. *Compare, O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (experience-based expert testimony by treating physician properly excluded where physician could not demonstrate the objectivity of his methodology); *Maynard v. Ferno-Washington, Inc.*, 22 F. Supp.2d 1171 (E.D.Wa. 1998) (witness permitted to testify as expert regarding the effectiveness of defendant's product warnings, based on his non-quantitative experience in evaluating safety warnings, decals, manuals, and instructions).

In the absence of a "reasoned explanation" requirement, one can reasonably expect legal errors regarding the reliability of experience-based expert testimony to go uncorrected.

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[7] One can reasonably expect that the 2000 amendments to Rule 702 will give rise to new areas of disagreement regarding the legal requirements imposed by the rule, and thus to new opportunities for legal error.

Must Daubert Factors Be Applied Whenever Arguably Applicable? The second Question Presented in the Petition is one that has divided the federal appellate courts. It is uncontested that Respondent's expert, Marvin Richardson, *could* have tested his theories that the Bronco II oversteers and "jacks," but that he did not do so. Whether a witness has tested his theory is one of the four principal factors cited by *Daubert* for use in determining whether the proposed expert testimony is sufficiently reliable to be admitted under Rule 702. The question that has divided the appellate courts is whether failure to test one's theory despite the feasibility of doing so is reason enough to *require* the exclusion of expert testimony regarding the theory.

Both the Fifth and Seventh Circuit have indicated that exclusion of the proffered testimony is required under those circumstances. *Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999); *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 538 (7th Cir. 2000). The Sixth Circuit, in the decision below, disagreed. It held that a trial judge retains the discretion to admit expert testimony based on a theory that has not been tested despite the feasibility of doing so. The court held, "The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility." Pet. App. 8a.

The absence of a "reasoned explanation" requirement thus ends up insulating unexplained district court decisions from effective appellate review, regardless of which side of this unresolved issue of law a district court ends up coming down on. In this case, the district court was held to possess discretion to admit Richardson's testimony despite the lack of testing, even though there is no indication in the record

that the district court ever exercised such discretion; for all one can discern from the record, the district court might simply have overlooked the testing issue. Conversely, if the district court had excluded Richardson's testimony on the ground that undertaking all feasible testing is an absolute requirement for admissibility, the failure to include that explanation in the district court's decision would have insulated that decision from appellate review as well. That is true even though the Sixth Circuit indicated in its decision below that such a decision would constitute an error of law; in the absence of a "reasoned explanation" requirement, the Sixth Circuit would have no way of determining that the district court had committed an error of law.

Applicability of Daubert Factors to Nonscientific Evidence. The absence of a "reasoned explanation" requirement can insulate errors of law committed in connection with Rule 702 decisions from appellate review, even after this Court has stepped in to resolve lower-court conflicts regarding the applicable legal standard. This case provides a good example of that possibility.

Following *Daubert*, courts were in widespread disagreement regarding whether the factors cited by *Daubert* as relevant in determining the admissibility of expert scientific testimony were also relevant to other types of expert testimony. The Court resolved that issue in *Kumho Tire* by ruling that the *Daubert* factors were indeed, relevant to *all* expert testimony. *Kumho Tire*, 526 U.S. at 141. Because the district court rendered its decision in this case before *Kumho Tire* was decided, it may well have decided (in accordance with then-applicable Sixth Circuit precedent) that it was free to ignore the *Daubert* factors in determining the admissibility of Richardson's non-scientific testimony. But

we will never know whether the district court committed this error of law (and thereby abused its discretion) because the district court failed to provide a reasoned explanation for its decision.

WLF recognizes that the Court has granted considerable leeway to district courts regarding *how* to determine reliability under Rule 702. It makes no sense, for example, to require attorneys to defend the reliability of fingerprint identification methods each and every time they seek to introduce expert testimony regarding fingerprint identification. As the Court explained in *Kumho Tire,* the "abuse of discretion" standard:

> [A]pplies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire, 526 U.S. at 152. But requiring a district court to provide a reasoned explanation for its Rule 702 decisions would not in any way reduce its leeway regarding how to conduct Rule 702 proceedings. If a district court intends to take for granted the reliability of a well-accepted scientific methodology, it need simply say so on the record. By doing so, it has preserved the possibility of appellate review of its legal conclusions. The Court should grant review in this case in order to impose a "reasoned explanation"

requirement on Rule 702 decisions and thereby provide effective appellate review of any such decisions that are based on errors of law.

II. REVIEW IS WARRANTED BECAUSE THERE IS EVIDENCE THAT DISTRICT COURTS HAVE ABDICATED THEIR GATEKEEPING FUNCTION IN A SIGNIFICANT NUMBER OF CASES

As the Court has acknowledged, the gatekeeping task assigned to district courts by Rule 702 often can be quite burdensome. *See, e.g., Joiner,* 522 U.S. at 147-48 (Breyer, J. concurring). It would not be surprising if the difficulty in making the often-complex judgments required by Rule 702 issues might tempt some judges to abdicate their gatekeeping altogether and instead simply admit all proffered expert testimony -- trusting to juries to be able to distinguish between reliable and unreliable testimony. Imposing a "reasoned explanation" requirement would encourage trial judges to resist such temptations.

A recent study conducted by the Federal Judicial Center (FJC) suggests that federal district judges have not always adhered strictly to the Rule 702 gatekeeping requirements. The study, released last month, reported the results of surveys conducted of district judges in 1991 and again in 1998 regarding their treatment of expert testimony. Molly Treadwell Johnson, Carol Krafka, & Joe S. Cecil, EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: *A PRELIMINARY ANALYSIS* (Federal Judicial Center 2000). The surveys asked the judges to provide information about their most recent civil trial in which expert testimony was proffered. In those cases in which admissibility of the expert testimony was

disputed, the judges were asked whether they limited or excluded the testimony.

The study revealed that federal courts were far more likely to limit or exclude challenged expert testimony in 1998 than they were in 1991 (which was two years before *Daubert* was decided). In 1991, 75% of surveyed judges said that they had allowed all proffered testimony in the relevant trial; only 59% gave the same answer in response to an identical question asked in 1998. *Id.* at 4. The study concluded that federal district judges were scrutinizing the reliability of expert testimony more carefully in 1998 (after *Daubert*) than they were in 1991 (before *Daubert*). *Id.* at 1, 4.

The surprising aspect of this finding is that the 1993 *Daubert* decision adopted a standard for admitting expert testimony that was more liberal than the standard then in place in most circuits. Before *Daubert*, most circuits had adopted the "*Frye* test" (derived from *Frye v. United States*, 293 F. 1013 (1923)), under which expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. *Daubert* rejected the *Frye* test, holding that it had not survived adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 589. In its place, the Court adopted a test for reliability under which "general acceptance" is not an absolute prerequisite but instead is one of four non-inclusive factors to be considered in judging reliability. *Id.* at 594. In other words, lower courts were instructed to adopt a less exacting standard, under which the lack of "general acceptance" of a scientific technique no longer automatically disqualifies expert testimony based on that technique from being admitted into evidence.

There is a likely explanation for district judges' increased scrutiny of expert testimony following *Daubert*'s liberalization of the standard for admitting such testimony: before 1993, many federal court's were abdicating their Rule 702 gatekeeping function, and *Daubert* served as a stern reminder of the need to perform that function faithfully. It is not possible to discern from the FJC data whether district judges have fully mended their ways and are now strictly adhering to the *Daubert/Kumho Tire* standard in all cases involving challenged expert testimony. Nonetheless, given the evidence that compliance was spotty in the recent past, the need for appellate oversight is apparent. That oversight can only be provided if district courts are required to provide a reasoned explanations for their decisions to admit or exclude proffered expert testimony. The need for oversight provides an additional rationale for granting the Petition.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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